STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 13, 2011
V TOMMY HECTOR MARTINEZ-LOPEZ, Defendant-Appellant.	No. 298683 Wayne Circuit Court LC No. 09-029738-FC

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
V MIGUEL ANGEL CRUZ-RIVERA, Defendant-Appellant.	No. 298786 Wayne Circuit Court LC No. 09-029738-FC

Before: O'CONNELL, P.J., and MURRAY and DONOFRIO, JJ.

PER CURIAM.

Following a joint trial before separate juries, defendant Martinez-Lopez was convicted of first-degree felony murder, MCL 750.316(1)(b), and defendant Cruz-Rivera was convicted of first-degree premeditated murder, MCL 750.316(1)(a), and possession of a firearm during the commission of a felony, MCL 750.227b.[1] Because the evidence was sufficient to support Martinez-Lopez's conviction and the officer in charge did not offer improper opinion testimony regarding his guilt, we affirm in Docket No. 298683. Further, because Cruz-Rivera was not denied the effective assistance of counsel, we affirm in Docket No. 298786.

[1] Both defendants were also convicted of additional offenses, but the trial court vacated those convictions based on double jeopardy grounds.

Defendants' convictions arise from the November 8, 2009, shooting death of Eleodoro Fernandez-Gill in Detroit. The prosecution's theory at trial was that Martinez-Lopez lured Fernandez-Gill to a vacant parking lot where Cruz-Rivera emerged from an alley and shot him during the course of an intended robbery.

I. DOCKET NO. 298683

A. SUFFICIENCY OF THE EVIDENCE

Martinez-Lopez first argues that the evidence was insufficient to convict him of felony murder. When reviewing the sufficiency of the evidence, we must determine whether the evidence, viewed in the light most favorable to the prosecution, was sufficient to enable a rational trier of fact to find beyond a reasonable doubt that defendant was guilty of the charged crimes. *People v Wolfe*, 440 Mich 508, 513-515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). Circumstantial evidence and any reasonable inferences that can be drawn from the evidence may be sufficient to prove the elements of a crime. *People v Abraham*, 234 Mich App 640, 656; 599 NW2d 736 (1999). "This Court will not interfere with the trier of fact's role of determining the weight of the evidence or the credibility of witnesses." *People v Williams*, 268 Mich App 416, 419; 707 NW2d 624 (2005). All evidentiary conflicts must be resolved in favor of the prosecution. *Id.*

In *People v Carines*, 460 Mich 750, 758-759; 597 NW2d 130 (1999), our Supreme Court articulated the elements of felony murder as follows:

> (1) the killing of a human being, (2) with the intent to kill, to do great bodily harm, or to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result [i.e., malice], (3) while committing, attempting to commit, or assisting in the commission of any of the felonies specifically enumerated in [the statute . . .]. [Citation omitted; brackets in original.]

Here, the underlying felony is assault with intent to rob while armed, which properly may serve as an underlying felony for felony murder. See *People v Akins*, 259 Mich App 545, 547; 675 NW2d 863 (2003). "The elements of assault with intent to rob while armed are: (1) an assault with force and violence; (2) an intent to rob or steal; and (3) the defendant's being armed." *Id.* at 554 (citation omitted). "Because this is a specific-intent crime, there must be evidence that the defendant intended to rob or steal." *Id.* (citation omitted).

The prosecutor's theory was that Martinez-Lopez aided and abetted Cruz-Rivera, who shot and killed Fernandez-Gill. To show that a defendant aided and abetted a crime, the prosecution must prove that (1) the defendant or another person committed the crime charged, (2) the defendant performed acts or gave encouragement that assisted in the commission of the crime, and (3) the defendant intended the crime's commission or had knowledge that the principal intended its commission at the time that he aided or encouraged the crime. *Carines*, 460 Mich at 757. See also *People v Robinson*, 475 Mich 1, 6; 715 NW2d 44 (2006). An aider and abettor's state of mind may be inferred from all the facts and circumstances surrounding the crime, including a close association between the principal and the defendant, the defendant's

participation in the planning and execution of the crime, and evidence of flight after the crime. *Carines*, 460 Mich at 757-758. "Mere presence, even with knowledge that an offense is about to be committed or is being committed, is insufficient to show that a person is an aider and abettor." *People v Wilson*, 196 Mich App 604, 614; 493 NW2d 471 (1992).

To aid and abet felony murder, a defendant need not participate in the actual killing, but he must possess the requisite intent, i.e., malice. *Carines*, 460 Mich at 769-771. "[I]f an aider and abettor participates in a crime with knowledge of the principal's intent to kill or to cause great bodily harm, the aider and abettor is acting with 'wanton and willful disregard' sufficient to support a finding of malice." *People v Riley (After Remand)*, 468 Mich 135, 141; 659 NW2d 611 (2003). One who aids and abets felony murder need not have the same malice as the principal. *Robinson*, 475 Mich at 14. Further, "malice can be inferred from the use of a deadly weapon." *People v Bulls*, 262 Mich App 618, 627; 687 NW2d 159 (2004).

Here, Jose Berrios, an eyewitness to the shooting, testified that he knew both Martinez-Lopez and Cruz-Rivera and saw both men together at the same bar at which Berrios and Fernandez-Gill passed time earlier on the night of the shooting. According to Berrios, Martinez-Lopez and Cruz-Rivera were at the bar only momentarily and appeared to be looking for someone. After Berrios and Fernandez-Gill left the bar, Fernandez-Gill drove Berrios to Berrios's car, but Berrios did not immediately get into his car. He instead walked to a nearby corner to urinate. Berrios received a telephone call from Martinez-Lopez, who asked Berrios where he was, and Berrios falsely responded that he was at home. Shortly thereafter, Berrios saw Martinez-Lopez's vehicle approach Fernandez-Gill, and heard Martinez-Lopez tell Fernandez-Gill that he wanted to talk to him. As Fernandez-Gill was talking to Martinez-Lopez, Cruz-Rivera emerged from an alley, wearing a mask, and fired several gunshots at Fernandez-Gill while demanding his gold chain necklace. Thereafter, Cruz-Rivera got into Martinez-Lopez's vehicle and Martinez-Lopez drove away.

Although there was no direct evidence that Martinez-Lopez knew that Cruz-Rivera intended to rob Fernandez-Gill of his gold necklace, there was sufficient circumstantial evidence to allow the jury to infer such knowledge and intent. Cruz-Rivera and Martinez-Lopez's association and their actions both before and after the shooting support an inference that they were working in concert and that Martinez-Lopez, after calling Berrios to confirm that he was no longer with Fernandez-Gill, helped lure Fernandez-Gill to an area where Cruz-Rivera could rob and shoot him. At a minimum, the facts support an inference that Martinez-Lopez participated in the crime with knowledge that Cruz-Rivera intended to kill or cause great bodily harm to Fernandez-Gill. Although Martinez-Lopez argues that there was insufficient evidence to show that he was aware of Cruz-Rivera's intent to steal Fernandez-Gill's gold chain, Berrios's testimony that Cruz-Rivera asked Fernandez-Gill for his chain while Cruz-Rivera was shooting supports an inference that the chain was the intended purpose of the assault. Thus, the evidence was sufficient to support Martinez-Lopez's felony-murder conviction under an aiding and abetting theory.

B. POLICE OFFICER'S TESTIMONY

Martinez-Lopez next argues that the trial court erroneously allowed the officer in charge to offer his personal opinion regarding Martinez-Lopez's guilt. Because Martinez-Lopez

objected to the challenged testimony on the ground that it was inadmissible hearsay rather than on the ground that it was improper opinion testimony as he argues on appeal, our review of this issue is limited to plain error affecting his substantial rights. *Carines*, 460 Mich at 763; *People v Maleski*, 220 Mich App 518, 523; 560 NW2d 71 (1996).

Martinez-Lopez correctly argues that it is improper for a witness to testify regarding the ultimate issue of a defendant's guilt. *People v Bragdon*, 142 Mich App 197, 199; 369 NW2d 208 (1985). In this case, however, the officer in charge did not offer an opinion regarding Martinez-Lopez's guilt. Rather, he discussed the investigation and how the evidence led him to suspect defendants as having committed the murder. Accordingly, the challenged testimony did not constitute plain error that affected Martinez-Lopez's substantial rights.

II. DOCKET NO. 298786

Cruz-Rivera argues that defense counsel was ineffective for acquiescing in the trial court's response to a jury request for a transcript of the trial testimony and for failing to argue in favor of a jury view of the crime scene after the jury asked to visit the scene. Because Cruz-Rivera did not preserve this ineffective assistance of counsel claim by raising it in the trial court, our review is limited to errors apparent on the record. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004).

To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant that he was denied a fair trial. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). "Defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy." *People v Petri*, 279 Mich App 407, 411; 760 NW2d 882 (2008). To establish prejudice, the defendant must show a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996).

A. TRANSCRIPT REQUEST

Less than two hours after the jury began its deliberations, it sent the trial court a note requesting "the court transcript." Following a discussion with the attorneys and with defense counsel's agreement, the trial court indicated that it would instruct the jury that preparation of a trial transcript would take several days and that the jurors should rely on their collective memories of the witness testimony. Cruz-Rivera now argues that defense counsel was ineffective for allowing the jury to be instructed in this manner and that the trial court's instruction violated MCR 6.414(J) because it foreclosed the possibility that the jury would be able to review the testimony at a later time.

"A defendant does not have a right to have a jury rehear testimony. Rather, the decision whether to allow the jury to rehear testimony is discretionary and rests with the trial court." *People v Carter*, 462 Mich 206, 218; 612 NW2d 144 (2000). MCR 6.414(J) provides:

> If, after beginning deliberation, the jury requests a review of certain testimony or evidence, the court must exercise its discretion to ensure fairness and to refuse unreasonable requests, but it may not refuse a reasonable request. The

> court may order the jury to deliberate further without the requested review, so long as the possibility of having the testimony or evidence reviewed at a later time is not foreclosed.

Here, the jury's request for the transcript was unreasonable because it was made less than two hours after the jury began its deliberations. Although Cruz-Rivera contends that the trial court could have offered to read back portions of the testimony, the jury did not request certain testimony, but rather, it requested "the court transcript." Our Supreme Court has determined in a similar situation that no violation of MCR 6.414(J) occurred. In *People v Holmes*, 482 Mich 1105; 758 NW2d 262 (2008), the Court stated:

> Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals and reinstate the defendant's convictions. The trial court did not abuse its discretion in denying the jury's request for a copy of the entire transcript after a little over an hour of deliberation. Because the jury requested the entire transcript and did not request "a review of certain testimony or evidence," the trial court did not violate MCR 6.414(J). The defendant did not demonstrate plain error affecting his substantial rights.

In this case, as in *Holmes*, the jury did not request to hear certain testimony but instead requested the entire trial transcript. In addition, it made the request less than two hours after it began its deliberations. Under these circumstances, defense counsel's acquiescence in the trial court's decision to instruct the jurors to rely on their collective memories was not objectively unreasonable. Further, Cruz-Rivera cannot show a reasonable probability that an objection would have been successful. Moreover, contrary to Cruz-Rivera's argument, the trial court did not foreclose the possibility that the jury would be able to review the testimony at a later time. The court merely indicated that it would take several days to prepare a transcript. Accordingly, Cruz-Rivera has not shown that defense counsel rendered ineffective assistance by acquiescing in the trial court's response to the jury's request.

B. CRIME SCENE VISIT

Cruz-Rivera next argues that defense counsel was ineffective for failing to argue in favor of a jury view of the crime scene when the jury asked to visit the scene after it had begun its deliberations. The trial court and the parties discussed the matter and agreed that a jury view was not permissible. Specifically, defense counsel noted that the evidence was closed.

In *People v Unger*, 278 Mich App 210, 255; 749 NW2d 272 (2008), this Court explained:

> "The court may order a jury view of property or of a place where a material event occurred." MCR 6.414(F); see also MCL 768.28 (stating that "[t]he court may order a view by any jury empanelled to try a criminal case, whenever such court shall deem such view necessary"). It is within the trial court's discretion to order a jury view of the crime scene.

A jury view of a crime scene is proper when it is believed that a personal view of the scene would allow the jurors to better comprehend the evidence already received. *People v Curry,* 49 Mich App 64, 67; 211 NW2d 254 (1973).

Here, the trial court cited valid reasons for believing that a crime scene view would not be helpful, including difficulties recreating the exact environment and lighting. Those same reasons demonstrate that defense counsel's decision not to argue in favor of a jury view was objectively reasonable. Moreover, substantial testimony describing the physical characteristics of the area was presented to the jury, including testimony from a crime scene unit officer who photographed the area. In addition to explaining the content of several photographs of the scene that were admitted as exhibits, the officer prepared a sketch of the scene which he explained to the jury. Cruz-Rivera himself also offered into evidence an aerial photograph of the area and a photograph of the crime scene. Thus, the jury had the benefit of other testimony and evidence to allow it to evaluate the crime scene and to assist it in determining Berrios's credibility regarding his account of the events from his vantage point.

Further, defense counsel's decision not to argue in favor of a jury view of the crime scene was a matter of trial strategy. During closing argument, defense counsel contended that Berrios's testimony was not reliable, in part because he could not have observed the shooting from his location between two houses "under these kind of dark obscured conditions." Although Cruz-Rivera now asserts that a jury view would have given the jury a better opportunity to evaluate the reliability of Berrios's testimony, he has not overcome the presumption that defense counsel did not support a jury view as a matter of trial strategy because of his concern that it could work against his attacks on Berrios's ability to observe the shooting. Under these circumstances, and given the substantial testimony and evidence describing and depicting the scene, Cruz-Rivera has failed to show that counsel's decision not to support a jury view was objectively unreasonable.

Affirmed.

/s/ Peter D. O'Connell
/s/ Christopher M. Murray
/s/ Pat M. Donofrio